legislative power exercised in defense of its own interests, but they also threaten to trample principles of minority political fairness elevated by the entire nation in the commands of the 14th and 15th Amendments, and embraced in bipartisan Congressional votes of support for the Voting Rights Act on five occasions. Through these votes, political partisans have themselves recognized that our Constitution and history demand that some rules enjoy a place of primacy in the political process.

Indeed this case raises the specter of an even greater, if less obvious, danger for minority voting rights: If this Court refrains from announcing any limitation on partisan gerrymanders regardless of their severity, and also permits partisan explanations to trump racially disparate voting behavior so as to insulate legislative enactments from judicial scrutiny, the Voting Rights Act, and the minority political fairness principles for which it stands, would become largely meaningless.

Accordingly, LDF submits this brief as *amicus curiae* to address two important issues of interpretation of the Voting Rights Act of 1965, as amended, and construed in the seminal Section 2 case of *Thornburg v. Gingles*, 478 U.S. 30 (1986). These issues, involving (a) the minority numerosity requirement (*Gingles*' first precondition), and (b) the legal significance of partisan alignments along racial lines in negating the significance of racially polarized voting (*Gingles*' third precondition), were the second of the Questions Presented in the jurisdictional statements in Nos. 05-296 and 05-204, respectively.

First, LDF urges this Court to recognize that it is consistent with the language, purposes and evolution of its own doctrine under the Voting Rights Act for minority voters to assert legally cognizable interests in opportunities to elect candidates of their

choice even in districts where those minorities are not sufficiently concentrated to comprise a numerical majority. However, in order for this principle to be both consistent with the statutory purposes of Section 2, and to serve the screening function for which the *Gingles* prerequisites were intended, it must be properly limited to recognize only reliable coalition districts that provide a discernible opportunity for the coalition to elect and not improvidently extended in the Section 2 context to encompass necessarily amorphous influence districts. If this Court agrees with our suggestion and modifies the first *Gingles* prerequisite, the judgment below should be vacated with instructions to reconsider the affected claims and issues in light of the new standard.

Second, if this Court reaches the issue of the interplay between partisan and racially polarized voting patterns under the *Gingles* preconditions, it should find that considerations of partisan polarization may not rebut, and thereby place beyond judicial reach, a *prima facie* showing under the *Gingles* preconditions but may be considered only under the totality of the circumstances.

These legal questions are of considerable moment. More than forty years after passage of the transformative Voting Rights Act, the Court is presented in these appeals with an opportunity to revisit its seminal Section 2 decision, as well as to reconcile partisan redistricting issues, recently considered in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that are bound up in, but not fully coextensive with, the minority political fairness principles to which Congress has consistently committed our nation. That these issues are now intertwined is no reason to abandon Constitutional and Congressional mandates. Indeed, the political and minority voter protection issues have always been intertwined.

ARGUMENT

I.

Districts In Which Voters Of A Particular Minority Group Do Not Constitute 50% Of The Relevant Population, But Who Are Able To Elect Candidates Of Their Choice In Combination With Other Minority Voters, Or With Reliable Crossover Votes From The Population Majority, Meet The First *Gingles* Precondition For A Viable Section 2 Claim

Jackson Appellants (plaintiffs below) urge the Court to extend the protections of Section 2 of the Voting Rights Act to districts in which a substantially large group of minority voters — while short of comprising a mathematical majority of the population — is nonetheless capable of nominating and electing its candidate of choice. Before the District Court, other plaintiffs requested recognition of a § 2 claim not only for so-called "coalition" or "crossover districts," but also for "influence districts," where minority voters, while unable to elect their candidates of choice, exercise varying levels of influence in the electoral process.[2] *Session v. Perry*, 298 F.

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[2]There has been some confusion among commentators litigants, and courts — including the District Court below, *see, e.g.*, *Session*, 298 F. Supp. 2d at 482-83 (identifying various proffered examples of influence and coalition districts) — over what constitutes an "influence," "coalition," or "crossover" district. For purposes of this brief, we consider an "influence district" one "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Ga. v. Ashcroft*, 539 U.S. 461, 482 (2003). A "coalitional" or "crossover district" is one in which (as the Court has described it), minority voters in a district — despite

Supp. 2d 451, 482-83 (E.D. Tex. 2004).[3]

The District Court, following the Fifth Circuit's strict "fifty percent rule," rejected these arguments. *Id.* at 482-83 & nn.111, 112 (citing *Perez v. Pasadena Independent Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000)). In so doing, it declined the opportunity to decide whether *any* set of circumstances might exist in which a group of minority voters less than an absolute majority of the relevant population could ever satisfy the first *Gingles* precondition. *Id.* at 476.

This Court has yet to rule on the question. *See, e.g.*, *Johnson v. DeGrandy*, 478 U.S. at 1008-09; *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Growe v. Emison*, 507 U.S. 25, 41 (1993); *Gingles*, 478 U.S. at 47 n.12; *see also Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (*en banc*) ("[S]everal Supreme Court opinions after *Gingles* have offered the prospect, or at least clearly reserved the possibility, that *Gingles*' first precondition — that a racial minority must be

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their not constituting a majority of the population — can form a coalition with another minority group sufficient to elect their candidate of choice, *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), or can demonstrate an ability to elect their candidate of choice "when joined by *predictably* supportive nonminority voters." *Ga. v. Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting) (emphasis added).

[3]This was the lower court's opinion supporting the judgment that was vacated and remanded in *Jackson v. Perry*, 160 L. Ed. 2d 252 (2004); the issues addressed by *amicus* in this brief were discussed by the court only in that opinion, and not in its June 9, 2005 remand opinion (reprinted at J.S. App. 1a-50a in No. 05-204).

able to constitute a 'majority' in a single-member district — could extend to a group that was a numerical minority but had predictable cross-over support from other groups.") (citing cases).

LDF writes separately as an *amicus* to urge the Court to interpret the first *Gingles* requirement, consistent with the text and purpose of the Voting Rights Act, to include those districts in which a minority group can demonstrate an "ability to elect" — even if it does not comprise a mathematical majority of the population. Such a limited extension of the first *Gingles* precondition would demonstrate a recognition of the political realities of the American electoral process and is fully consistent with the evolution of the Court's Section 2 jurisprudence. The Court should not, however, extend coverage of Section 2 to include claims in which a minority group alleges that it can exercise some amorphous degree of "influence" over elections or governance, as doing so would establish a new standard that is both unworkable and ungrounded in either the statute or the relevant case law.

A. Recognizing "Crossover" or "Coalition" Districts under Section 2 Is Consistent with the Statutory Language, Structure and Intent, and also with This Court's Voting Rights Act Jurisprudence.

Because the language of Section 2 explicitly protects the ability of minority voters to "*elect representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added), the focus of the Section 2 inquiry at the precondition stage should be whether the specific conditions in a jurisdiction permit the fact-finder to conclude that a minority group in a given district does in fact have a reliable opportunity to elect its candidates of choice. *See Gingles*, 478 U.S. at 43-46 (describing legislative history and purpose of the Act). The pertinent difference

between "coalition" or "crossover districts," on the one hand, and "influence districts," on the other, is that the former districts involve instances in which there is a cognizable "ability to elect" claim.

The Court should not interpret the *Gingles* preconditions so strictly as to frustrate this clear statutory purpose. The *Gingles* test was fashioned in order to make sure that a cognizable Section 2 claim (and remedy) exists, especially given that the statute expressly disavows any guarantee of proportional representation. *Gingles*, 478 U.S. at 50 & n.17 (purpose of first precondition designed so that Section 2 would "only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*") (emphasis in original) (internal citations omitted). Thus, *Gingles* viewed the first precondition as a means to ensure that courts would consider Section 2 claims in jurisdictions where "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice," 478 U.S. at 50 (emphasis in original), and the precondition should be understood to serve a functional — not inflexible — purpose. *Growe*, 507 U.S. at 40 ("[T]he 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.")

Nor is there a practical reason to limit the protections of Section 2 to majority-minority communities. There is nothing talismanic about a district with a (single or combined) minority population greater than fifty percent. Both the *Gingles* preconditions and Section 2 itself were designed to provide practical measures for realizing the ability of minority voters to

elect candidates of choice.[4] The degree of racial polarization will drive what level of minority population is necessary and the analysis can vary even within a single state, or jurisdiction.

The *Gingles* Court itself recognized that some white crossover voting may exist and should be considered in the fact-intensive analysis of whether a Section 2 claim could be established. 478 U.S. at 56 ("And, in general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover' votes* rises to the level of legally significant white bloc voting. . . . The amount of white bloc voting that can generally 'minimize or cancel' . . . black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors.") (emphasis added) (internal citations omitted).

Similarly, several lower courts — including the Fifth Circuit — have expressly recognized that minority coalitions among groups that each may not meet the first *Gingles* prerequisite can be considered together to satisfy its requirement, at least if they can establish that voters of both

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[4]Indeed, in the early years of Section 2 enforcement, courts routinely required supermajorities to guarantee the minority voters' ability to elect. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984) (collecting cases). Just as it *is* possible that minority voters who constitute a bare majority of the population a district may fail to demonstrate that they have the ability to elect candidates of their choice, it is also theoretically possible that minority voters who are *less* than a majority of a district *can* make such a showing. *See Gingles*, 478 U.S. at 56 n.24 and accompanying text. Courts should be free to continue to take into account the changing landscape of American politics and the development of minority coalitions or the phenomenon of limited white crossover voting where it exists.

groups vote together cohesively. *See, e.g.*, *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1244-46 (5th Cir. 1988) (affirming trial court finding of cohesion and applying principle), *cert. denied*, 492 U.S. 905 (1989); *League of United Latin American Citizens v. Midland Ind. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir.) (same), *vacated and aff'd on other grounds*, 829 F.2d 546 (5th Cir. 1987); *see also Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526-27 (11th Cir. 1990) (recognizing principle but affirming trial court's determination that cohesion between groups not proved); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (same).

This Court has not decided the question. However, in *Ga. v. Ashcroft*, all of the Justices recognized the relevance of coalition and crossover districts in assessing whether retrogression under Section 5 occurred in districts where minority voters were provided an opportunity to elect their candidates of choice under the benchmark plan. *See* 539 U.S. at 480 ("[A] State may choose to create a greater number of districts in which it is likely — although perhaps not quite as likely as under the benchmark plan — that minority voters will be able to elect candidates of their choice."); *id.* at 492 (Souter, J., dissenting) ("The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by *predictably* supportive nonminority voters.") (emphasis added).

Although pervasive racially polarized voting patterns continue to dominate the political landscape, *see, e.g.*, Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997); Samuel Issacharoff, *Polarized Voting and the Political Process: The*

Transformation of Voting Rights Jurisprudence, 90 MICH. L. REV. 1833 (1992), there are (and have long been) some communities in which minority-preferred candidates enjoy limited, reliable white crossover support or in which minority voters have formed sufficiently large and dependably cohesive coalitions with other racial or ethnic minorities to elect a candidate of their choice. *See, e.g.*, Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. REV. 1383, 1394-1423 (2001) (empirical analyses of election results in certain communities where black voters were able to elect candidates of choice despite not comprising a majority of the districts' respective populations).

In its rulings since *Gingles*, the Court has recognized the phenomenon that there are some communities in which coalitions are formed among minority groups or small, reliable levels of crossover voting from white voters that provide certain minorities, who themselves may not comprise a majority of the voting population, with a reasonable opportunity to elect their candidates of choice. *See, e.g.*, *Ga. v. Ashcroft*, 539 U.S. at 480; *DeGrandy*, 512 U.S. at 1023.[5]

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[5]It bears emphasis that whether a court will find reliable, predictable majority crossover voting of sufficient size to allow the election of minority voters' candidates of choice will depend on the nature and extent of the proof offered by Section 2 claimants. The inquiry is similar in nature to that described by Justice Brennan in *Gingles* with respect to determining whether white bloc voting would "generally 'minimize or cancel,' . . . black voters' ability to elect representatives of their choice," and "will vary from district to district according to a number of factors." *See Gingles*, 478 U.S. at 56, text at n.24 (setting out non-exclusive list of potentially relevant factors).

To be sure, it will continue to be true that for most Section 2 claims, having a majority of minority voters will be necessary to demonstrate an "ability to elect." But, the existence of crossover and coalition districts where the opportunity to elect candidates of choice is available to minority voters should be embraced and protected by the Court's Section 2 jurisprudence, not held in check based on an unnecessarily restrictive interpretation of its judicially-crafted test. *DeGrandy*, 512 U.S. at 1020 (describing the Voting Rights Act as "a statute meant to hasten the waning of racism in American politics"). Requiring minority voters to show that they are an absolute majority ignores the practical reality that, in some jurisdictions, they are capable of electing preferred candidates without such numbers. It also places an artificial limitation on the effectiveness of Section 2 by failing to allow it to account for shifts in the political landscape. *See Voinovich*, 507 U.S. at 158 ("[T]he *Gingles* factors cannot be applied mechanically without regard to the nature of the claim.").

Indeed, in *DeGrandy*, this Court expressly rejected the State's safe harbor argument on the grounds that relying too heavily on majority-minority districts as the only way in which minorities may enjoy equal electoral opportunity would "obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." 512 U.S. at 1020.

B. Section 2 Claims Involving "Coalition" or "Crossover" Districts Are Governed by Manageable Standards Already Familiar to Federal Courts from Past Section 2 Litigation.

Relaxing the first *Gingles* precondition of the Section 2 inquiry to permit a more exacting focus on minority voters' "ability to elect" in a coalition or crossover district only brings it closer in line with the text of the statute, which codified the "totality of the circumstances" analysis from *White v. Regester*, 412 U.S. 755 (1973), and the intent of Congress, which was to take account of the contemporary, practical realities of the political process. *See Gingles*, 478 U.S. at 45 (noting that the Senate Committee recognized that "the question whether the political processes are 'equally open' depends on a searching practical evaluation of the 'past and present reality,' . . . and on a 'functional' view of the political process.") (some internal quotations and citations omitted). *See also Ga. v. Ashcroft*, 539 U.S. at 480 ("The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine.").

This more practical application of the first *Gingles* precondition recognizing districts that may not have a numerical majority of minority voters would not open the door to claims that Congress never intended to protect in Section 2, since proof of the other two *Gingles* preconditions would remain necessary. *See Ga. v. Ashcroft*, 539 U.S. at 485 ("And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district."). The other two *Gingles* prongs, along with other "totality of the circumstances" considerations, will assist courts in determining if a given

district provides minority voters with an "ability to elect" as opposed to merely the "ability to influence."[6]

Indeed, the determination of an "ability to elect" in coalition or crossover districts is one that even the dissenting Justices in *Ga. v. Ashcroft* acknowledge is concrete and demonstrable, 539 U.S. at 492 (Souter, J., dissenting), not an abstract hope too elusive to for courts to establish limiting principles, as is the case with the recognition of influence districts. *Id.* at 496-97 (but noting difficulties of quantifying "influence").

While it is true that the Court's recent decision in *Ga. v. Ashcroft* held that influence districts could be considered in a § 5 retrogression analysis, the recognition of influence districts in that context should not extend to Section 2. *Ga. v. Ashcroft*, 539 U.S. at 478 ("We have, however, 'consistently understood' § 2 to "combat different evils and, accordingly, to impose very different duties upon the States.") (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)). *See also Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (Sections 2 and 5 are "different in structure, purpose, and application"). Indeed, as the Court in *Ga. v. Ashcroft* noted, "[i]n contrast to § 5's retrogression standard, the 'essence' of a § 2 vote dilution claim is that 'a certain electoral law, practice, or structure . . .

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[6]For example, a minority group could require so many crossover votes that it does not truly possess the capacity to choose its own candidate, but only to influence electoral contests between two or more white-preferred candidates. Similarly, a minority group that is too small and that thus requires too high a level of white crossover support will be unlikely to satisfy the third *Gingles* precondition: that white regularly vote as a bloc against the minority preferred candidate. A careful analysis of election data, therefore, will shed light on which role minority voters actually play in the political process.

cause[s] an inequality in the opportunities enjoyed by black [or other minority voters] and white voters *to elect their preferred representatives.*'" *Id.* (quoting *Gingles*, 478 U.S. at 47) (emphasis added).

Just as the text of Section 2 provides the basis for a more flexible interpretation of the first *Gingles* precondition, therefore, it also provides a built-in limiting principle: the requirement that minorities in an existing or proposed district demonstrate an ability to elect "representatives of their choice." 42 U.S.C. § 1973(b). Whereas the parameters of a Section 5 retrogression determination find their origins in this Court's jurisprudence, *see Beer v. United States*, 423 U.S. 130, 141 (1976), the statutory language about the minority group's "ability to elect" is the touchstone of any Section 2 analysis.

The court below erred in ending its Section 2 analysis when it found that African-American voters in District 24 were unable to meet the majority-minority requirement of the first *Gingles* precondition. *Sessions*, 298 F. Supp. 2d at 483 ("A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the [Voting Rights] Act."). Its singular focus on the numerical aspect of the *Gingles* test was unwarranted and turned its attention away from the relevant "ability to elect" question.

This Court should clarify its ruling in *Gingles*, remand the case to the District Court to determine, under the totality of the circumstances, whether District 24 provides minority voters an opportunity to elect their candidate of choice. Among other circumstances, the lower court should seek to determine the degree of racial polarized voting with special focus given to whether the district provides the minority voters with the opportunity to elect candidates of choice.

II.

Whatever Limitations, If Any, The Court Places Upon Political Gerrymanders, It Is Essential That They, Like Other Redistrictings, Remain Subject To Meaningful Scrutiny Under Section 2

In the last two decades, developments in computer technology and software programming have made possible increasingly sophisticated and precise shaping of districts for political, among other, ends, and this Court's attention has been correspondingly drawn to the question whether the Constitution places any limits upon partisan gerrymandering. These appeals grow out of cases filed to challenge one such redistricting.

Some plaintiffs in those cases alleged that the 2003 districting plan at issue, even if it were drawn for partisan ends, also infringed upon minority voting rights protections afforded by Section 2 of the Voting Rights Act. The court below rejected those claims on the ground, *inter alia*, that their proponents could not satisfy the first *Gingles* precondition. See *supra* § I. However, the court also indicated in its decision that even were this not its view, it would have rejected the claims by applying a doctrine developed by the Fifth Circuit more than a dozen years ago, which holds that neither the second nor the third *Gingles* preconditions (cohesion and racially polarized voting) can be established where party affiliation is also characterized by substantial racial differences. *Session*, 298 F. Supp. 2d at 478 n.88.

Such an approach would effectively eliminate the application of Section 2 to redistricting plans in areas where political party loyalties have split along racial or ethnic lines, which has become common in our nation at this point in its

history. That result is insupportable as a matter of the statutory text or Congressional purposes underlying enactment and amendment of Section 2 of the Voting Rights Act. It would be especially unfortunate if this Court were to sanction it, directly or implicitly. Rather, the Court should make clear in its decision on these appeals that the Fifth Circuit's approach is inconsistent with the Act.

A. The Doctrine that Racial Cleavages in Political Party Affiliation Negate the Significance Under Section 2 of Racial Voting Patterns Misconstrues this Court's Section 2 Jurisprudence.

For twenty years, racially polarized voting patterns have been at the core of this Court's Voting Rights Act jurisprudence. *See, e.g., Gingles,* 478 U.S. 30. The analysis of racially polarized voting is a very apt analytical tool because it aids in identifying the circumstances in which private behavior combines with structural electoral arrangements to impede equal opportunities for minorities to elect candidates of choice and participate in the political process. *See id.* at 51. Under Section 2, two of the three *Gingles* preconditions involve variants of bloc voting. The standard is in many respects self-regulating. If a substantial degree of polarization is present, assuming other threshold conditions are met, the analysis proceeds, whereas a failure to show legally significant polarization ends the inquiry.

Since this Court decided *Gingles*, the preconditions have played an essential gate-keeping function for courts by allowing them to approach Section 2 claims with a discernible standard. As the designation suggests, meeting the preconditions does not suffice for purposes of the ultimate liability determination under Section 2 — that determination is made only under the totality of the circumstances, including consideration of the

"Senate factors." *Id.* at 36-37. Accordingly, in the area of minority voting rights protection, Congress has identified a problem, provided a remedy, and this Court has supplied, and at times refined, a judicially manageable standard.

Racially polarized voting patterns are the touchstone of Section 2 claims. In *Gingles,* the Court addressed the question whether the Section 2 dilution inquiry concerns itself exclusively with the existence of polarized voting patterns or also with the reasons that such patterns occurred. Writing for the Court, Justice Brennan explained that:

> It is the *difference* between the choices made between blacks and whites – not the reasons for that difference – that results in blacks having less opportunity than whites to elect preferred representatives. Consequently, we conclude that under the "results test" of Section 2, only the correlation between the race of the voter and selection of certain candidates, not the causes of the correlation matters.

Id. at 64 (emphasis in original).

All Justices accepted the principle announced by this portion of Justice Brennan's plurality opinion, at least insofar as it applied to the preconditions to bringing a Section 2 claim. *See Gingles,* 478 U.S. at 100 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring in the judgment):

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other

> than race, such as the underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry.

(Justice White did not join this part of Justice Brennan's opinion only insofar as it would not have permitted consideration of the race of the candidate, as well as the race of the voter, in the "totality of the circumstances" analysis. *Gingles*, 478 U.S. at 83.)

Notwithstanding this functional agreement that the *Gingles* preconditions do not end the dilution analysis but rather operate to narrow the number of cases that require further Section 2 consideration under the totality of the circumstances, the Fifth Circuit has adopted an inconsistent rule which permits the very type of "rebuttal evidence" disfavored by the Court. *See League of Latin American Citizens v. Clements*, 999 F.2d 831, 850, 858-59 (5th Cir. 1993) (*en banc*) (*LULAC*), *cert. denied*, 510 U.S. 1071 (1994). Although the *LULAC* court insisted on an evaluation of the role of partisan causation as an explanation for polarized voting patterns with all of the attendant problems of that approach, *see, e.g.*, Bernard Grofman & Lisa Handley, *Issues in Voting Rights*, 65 MISS. L.J. 205, 222-34 (1995); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1223-27 (1996), it did not clearly explain how its newly announced rule of Section 2 analysis would operate. *LULAC*, 999 F.2d at 860 (". . . we need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain [that is, to negate the role of] partisan influence, the result is the same.")

The *LULAC* rule has both doctrinal and evidentiary shortcomings. As a legal matter, it introduces partisan

intent/causation into the proof requirements of a statute that was expressly amended by Congress to establish a results test in order to make proof of intent unnecessary. *See Gingles*, 478 U.S. at 35-37 (summarizing history). As an evidentiary and empirical matter the problem is two-fold:

First, there is sufficient correlation between partisanship and racial bloc voting patterns in so many parts of the country that the two are at best complicated, or in some cases impossible to disentangle. *See, e.g.*, Grofman & Handley, 65 MISS. L.J. at 229 (". . . separating out racial from partisan concerns will not be easy, and forcing plaintiffs to try to do so in order to succeed in proving a Section 2 violation in situations involving partisan elections will make it much harder for plaintiffs to prevail in such challenges, even in situations where minority exclusion [is] total"); Karlan & Levinson, 84 CAL. L. REV. at 1223-24 (noting shortcomings of statistical models that attempt to disaggregate race and partisanship); Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495, 506 (1985) (criticizing attempts by courts to "cleanse" racially divided voting patterns of their racial content through multivariate analysis); *cf. Vieth v. Jubelirer*, 541 U.S. at 287 (Scalia, J.) ("But a person's politics is rarely as readily discernible — and *never* as permanently discernible as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.").

Second, the introduction of partisan causation in the initial precondition stage of the *Gingles* analysis transforms a judicially manageable standard for political fairness to minority voters into a judicially created barrier to the congressionally authorized method of relief.

In a footnote, the court below appears to extend the Fifth Circuit's polarized voting causation rule. *Session*, 298 F. Supp. 2d at 478 n.88. Contrary to *Gingles* and its progeny, the court announces that its newly devised test requires that at the *Gingles* preconditions stage, plaintiffs bear the burden of *disproving* what amounts to a presumption of partisan causation. *Id.*[7] Placing this affirmative burden on plaintiffs at the threshold stage transforms partisanship from one factor among others to be taken into account in the "totality of the circumstances" analysis into an outcome-determinative issue, despite the facts that: *(a)* it is not mentioned in the statute; and, *(b)* all members of the Court in *Gingles* accepted the proposition that the issue was relevant only at the final "totality" stage of the case, except for three Justices who would have excluded its consideration even at that stage.

The Fifth Circuit's particularly muscular version of partisan polarization presumption is also anomalous among lower federal courts. Although several Circuits recognize that it is proper to consider explanations for voting patterns under

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[7] *Cf. Johnson v. Cal.*, 162 L. Ed. 2d 129, 139 (2005) ("[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Respondent, however, . . . contends [that] a *Batson* claim must prove the ultimate facts by a preponderance of the evidence in the prima facie case . . . . Respondent's argument is misguided. . . . 'It is not until the *third* step that the persuasiveness of the justification becomes relevant — the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.' *Purkett* [*v. Elem*, 514 U.S. 765] at 768.") Since Section 2 was amended in 1982 to eliminate any requirement of proving intent, placing the burden on plaintiffs to disprove a presumed nondiscriminatory explanation for racially polarized voting patterns is even more insupportable.

the totality of the circumstances, consistent with Justice O'Connor's opinion in *Gingles*, the Fifth Circuit appears to stand alone in its requirement that partisan causation be presumed to explain racially polarized in voting patterns. *See e.g., United States v. Charleston County*, 365 F.3d 341, 348-49 (4th Cir. 2004); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995).

B. The Fifth Circuit's Partisanship Exception to the Second and Third *Gingles* Preconditions Ignores the Extent to which Race Has Become Implicated in Partisan Alignment.

Apart from the doctrinal and evidentiary problems with the *Session* variant of the partisan polarization presumption in the Section 2 analysis, the rule ignores the extent to which today's political parties have been shaped by express or implicit racial considerations and appeals. Faced with an entrenched and well-documented history of discrimination in voting with discernible present day effects, Congress has determined on several occasions that the best way to enhance minority political inclusion is to take account of and try to ameliorate racial cleavages rather than seeking to explain them away.

The contemporary party alignments happened over time, but they cannot be said to be sufficiently different in nature from the trend that began prior to the passage of the Voting Rights Act to justify a prophylactic rule that places them beyond the reach of courts. *See* Grofman & Handley, 65 Miss. L.J. at 229 (explaining that Blacks have been overwhelmingly Democratic in their party affiliation since 1964, and whites have become increasingly Republican).[8] The contemporary

[8]In *Gingles*, 478 U.S. at 40, this Court acknowledged the record evidence of the use of race to divide the electorate for

partisan trends emerged in a context that scholars and political operatives both recognize. *See* Karlan & Levinson, 84 CAL. L. REV. at 1223 (citing Thomas B. Edsall & Mary D. Edsall, CHAIN REACTION; THE IMPACT OF RACE RIGHTS, AND TAXES ON AMERICAN POLITICS, at 151 (1991) (arguing that racial attitudes after the 1960s "became a central characteristic of both ideology and party identification, integral to voters' choices between Democrats and Republicans").

Indeed, even political partisans, at times, express a willingness to acknowledge the role that race has played in the prevailing political alignment. As the *Washington Post* recently reported, in a prepared speech delivered to the NAACP during its national conference in July of 2005, Republican National Committee Chairman, Ken Mehlman, apologized for "the southern strategy," which the paper described as "Republican efforts to use race as a wedge issue on matters such as desegregation and busing — to appeal to white southern voters." Mike Allen, *RNC Chief to Say It Was 'Wrong' to Exploit Racial Conflict for Votes,* WASHINGTON POST, July 14 2005, at A4. "By the '70s and into the 80s and

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nearly a century, continuing beyond the date of the last Voting Rights Act renewal:

> [T]he [district] court found that white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

90s, the Democratic Party solidified its gains in the African American community, and we Republicans did not effectively reach out . . . . Some Republicans gave up on winning the African American vote, looking the other way or trying to benefit politically from racial polarization. I am here today as the Republican Chairman to tell you we were wrong." *Id.*

Nor is the history of the Democratic Party without substantial racial strife. *See* Mary Frances Berry & John W. Blassingame, LONG MEMORY; THE BLACK EXPERIENCE IN AMERICA 385 (1982) (detailing the exclusion of the integrated Mississippi Freedom Democratic Party from the party's national convention in 1964); Paul Frymer, UNEASY ALLIANCES; RACE AND PARTY COMPETITION IN AMERICA 3-7 (1999) (detailing the neglect of African-American interests by the modern Democratic party). Indeed, Frymer observes more broadly that "[a]t most moments in American history, the desire of political parties to seek national office has meant marginalization for African Americans . . . . We are . . . one of few democratic nations where party leaders have an incentive to appeal almost exclusively to the majority group." *Id.* at 6.

In light of this history, whether desirable or not, it seems particularly incongruous for a court to begin its analysis of a congressionally mandated minority voting protection and political fairness measure with the presumption that racial patterns of partisan affiliation negate the significance of persistent racial polarization at the ballot box. A rule whose expansion has the potential to allow political parties to "benefit politically from racial polarization" rather than ameliorating it is unwarranted.

C. Whether or Not It Holds that There Are Constitutional Limits to Partisan Gerrymandering in the Redistricting Process, the Court Should Explicitly Disapprove the Fifth Circuit's Unique Partisanship Exception to Section 2.

For the reasons we have described above, politics in the United States is now substantially intertwined with race and ethnicity, and correspondingly, partisan gerrymandering may dramatically impact minority voting strength, as the highly partisan redistricting plan at issue in these appeals demonstrates. With support from Members of both major political parties, Congress has exercised its constitutional authority to place minority voting rights above partisan political interests through the passage and renewal of the Voting Rights Act.[9]

If this court allows the continued application of a rule that racial or ethnic polarization in partisan alignment negates the existence of the *Gingles* preconditions of cohesive minority voting and racially polarized voting, it will place minority voters beyond the reach of Section 2 protections. This result is contrary to the language and purposes of the Voting Rights Act and this Court should expressly disapprove it in these appeals, whether or not it fashions limitations on partisan gerrymanders.

The need for the Court explicitly to address the *LULAC* rule is especially critical if the result of its renewed deliberations on partisan gerrymandering places no substantial limitations upon that device, as party organizations can be

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[9] *Cf. Vieth*, 541 U.S. at 275 (discussing Congress' authority over Congressional districting pursuant to Art. I, Sec. 4 of the Constitution and noting the failure to exercise that authority in recent history to limit partisan gerrymandering).

expected to maximize political advantage in this fashion to the greatest extent allowable by the law.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully suggests that the judgment below should be vacated and the case remanded for reconsideration in light of the clarified *Gingles* standards urged in this brief.

Respectfully submitted,

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In The
Supreme Court of the United States

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICI CURIAE* THE REFORM INSTITUTE, THOMAS MANN, AND NORMAN ORNSTEIN IN SUPPORT OF APPELLANTS

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Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

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INTEREST OF *AMICI CURIAE*[1]

The Reform Institute, Inc. is a not-for-profit 501(c)(3) educational organization representing a thoughtful voice of reform in debates over campaign finance and election administration. Former Congressman Amo Houghton serves as Chair of the Board. The Reform Institute has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase meaningful citizen participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state legislature can redraw congressional districts so as to minimize the likelihood that a particular political party's candidates will win in the election. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

Thomas E. Mann and Norman J. Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 35-year careers, they have individually and jointly written extensively about Congress, elections, redistricting and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court.

been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their newest book, The Broken Branch, will be published by Oxford University Press in June 2006. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, the Continuity of Government Commission, and the Election Reform Project. Mann is co-editor of Party Lines: Competition, Partisanship, and Congressional Redistricting, recently published by Brookings.

SUMMARY OF ARGUMENT

The Framers envisioned the House of Representatives as a unique structure of the national government. Unlike the Senate, the President, or the courts, it was to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 337 (James Madison) (Robert Scigliano ed., 2001). As John Adams put it, the body of the people's representatives should "be in miniatur[e] an exact portrait of the people at large. It should think, feel, reason, and act like them." John Adams, *Thoughts on Governance*, *in* 4 Papers of John Adams 87 (Robert J. Taylor ed., 1977). With this in mind, the Framers carefully designed the House to "bin[d] the representatives to their constituents . . . [and] to extend the influence of the people over their representatives." The Federalist No. 52, at 339. They insisted on direct election "by the People of the several States," a broad franchise, regular reapportionment as among the states, and frequent elections. U.S. Const. art. I, § 2. Of these, the last was the

most important, for "without the restraint of frequent elections" in the House, the Framers thought, "[a]ll [other] securities [against oligarchy] would be found very insufficient. . . ." The Federalist No. 57, at 367. By this device

> the House of Representatives is so constituted to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

Id. Nearly every special feature of the House's design was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.

Unfortunately, congressional redistricting has defeated much of the Framers' vision and intercensal redistricting threatens it even further. High rates of incumbent reelection, declining competitiveness of congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The 2002 congressional elections make this point starkly. Only four challengers defeated House incumbents – the lowest number in modern American history. Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results (1988); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional*

Redistricting, 2 Election L.J. 179, 182 (2003). Only 43 House incumbents, moreover, won reelection "narrowly" – defined generously as by less than 60 percent of the vote – while 338 House incumbents enjoyed very large victory margins – 20 percent or more – including 78 who ran unopposed by a major party challenger. *Id.* at 183 & tbl. 1; *see* Michael Barone & Richard E. Cohen, The Almanac of American Politics 2006 (Nat'l J. Group 2006) (providing underlying information on each House race for computation of number of incumbents running unopposed by major party challengers). In the nation's largest state, California, not a single challenger in the general election received as much as 40 percent of the vote. Hirsch, *supra*, at 182. And more than a third of all States sent to Congress *exactly* the same House delegation as before. *Id.*

These facts are particularly striking because the 2002 elections were the first held after the latest reapportionment. Historically, incumbents suffer in such elections. As their old voters disappear and new voters replace them, incumbents usually find their seats less secure. Their new voters can have quite different interests than their previous constituents. From 1972 to 1992, in fact, House turnover averaged 45 percent higher in immediate post-reapportionment Congresses. These Congresses contained an average of 87 freshmen, while the others in this period contained only 60. *Id.* at 183. In 2002, however, only 53 freshmen were elected to the House – less than half the number elected in 1992. *See* Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, Vital Statistics on Congress 2005-2006 at tbl. 2-7 (Nat'l J. Group forthcoming 2006) (calculated by subtracting number of incumbents reelected listed in sixth column from 435, the overall number of representatives). In 2002, incumbents had a very easy ride

overall. Only 35 incumbents retired (rather than the average of 48 in other recent post-reapportionment Congresses); only eight lost in the primaries and only eight lost in the general election, in each case half the time to another incumbent. *Id.* This lack of competition was, moreover, peculiar to the people's chamber. On the same day that less than ten percent of House races were being decided by margins of ten percent or less, nearly half of all gubernatorial and U.S. Senate races were that close. Hirsch, *supra*, at 183. One significant difference, of course, is that no one can gerrymander a statewide district.

The 2004 elections were hardly better. Only seven out of the 402 incumbents seeking reelection were defeated and four of these were victims of the partisan-motivated, intercensal gerrymander in Texas. Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 Pol. Sci. Q. 199, 199 (2005) (hereinafter "*Polarized Politics*"). Without the one-time Texas gerrymander, in fact, only eight House seats would have changed party, an all-time low. *Id.* at 200. The Texas intercensal redistricting had two primary effects. First, it meant that Republicans gained rather than lost House seats in the nation overall. *Id.* at 201. The plan, which was designed to eliminate seven incumbent Democrats, led to one targeted incumbent changing parties, one retiring, four losing in the general election, and only one surviving. *Id.* at 201-02. Second, it further shored up each congressional district in the state for one party or the other. Of the 22 districts where incumbents ran with an underlying partisan majority, the incumbent's average share of the two-party vote was 75 percent. App. to Juris. Statement of Eddie Jackson 225a. Revisiting the post-census redistricting thus allowed the state to radically change the partisan